

P 241821Z APR 09
FM USEU BRUSSELS
TO SECSTATE WASHDC PRIORITY
INFO EUROPEAN POLITICAL COLLECTIVE PRIORITY
DEPT OF JUSTICE WASHDC PRIORITY
DEPT OF HOMELAND SECURITY WASHINGTON DC PRIORITY
NSC WASHDC PRIORITY

C O N F I D E N T I A L USEU BRUSSELS 000597

NOFORN

STATE FOR INL, EUR, INL/PC, INL/AAE, EUR/ERA, L/LEI;
JUSTICE FOR CRIMINAL DIVISION, OFFICE OF INTERNATIONAL
AFFAIRS;
HOMELAND SECURITY FOR OFFICES OF POLICY AND INTERNATIONAL
AFFAIRS

E.O. 12958: DECL: 02/13/2019

TAGS: PREL PGOV PTER KCRM PTER EON

SUBJECT: THE FUTURE OF EU DECISION MAKING ON POLICE AND
JUDICIAL COOPERATION -- WITH OR WITHOUT THE TREATY OF LISBON

REF: 08 BRUSSELS 1590 (NOTAL)

Classified By: INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT
COUNSELOR JAMES P. MCANULTY FOR REASONS 1.4 B AND D

SUMMARY

¶1. (C/NF) With or without the Lisbon Treaty, we anticipate that major Treaty provisions affecting police and judicial cooperation in criminal matters will ultimately find their way into the EU decision-making and institutional frameworks.

The Treaty's fate will determine how fast these changes make their way into the EU "acquis." The Lisbon Treaty would have far-ranging effects on decision-making on police and judicial cooperation in criminal matters. The Treaty envisions instituting qualified majority voting (QMV) as the norm for decision-making in this area to speed decision-making within the Council of Ministers; however, the Treaty also accords "co-decision" authority to the European Parliament (EP), which could offset gains in efficiency or speed. The Treaty would also give national parliaments the ability to slow down approval of legislation through a system of "emergency brakes." The United Kingdom (UK) and Ireland, and to a lesser extent Denmark and Poland, will enjoy significant "opt-out" and "opt-in" powers, which could produce an ever-changing patchwork of EU legislation on criminal justice and police cooperation.

¶2. (C/NF) Given the far-ranging impact of Treaty provisions on decision-making for legislation and policies on judicial and police cooperation in criminal matters, U.S. policy makers will want to continue pursuing various initiatives with the EU to timely conclusion. Prompt ratification of the U.S.-EU mutual legal assistance and extradition treaties and establishment of a negotiating mandate for a binding international agreement on data privacy principles will be critical to locking in innovative measures favorable to U.S. and transatlantic national security, counter-terrorism, and law enforcement interests. A greater EP role in JHA decision-making will place a premium on more frequent diplomatic outreach with political groupings. END SUMMARY.

MAJOR IMPACT ON POLICE AND JUDICIAL COOPERATION

¶3. (C/NF) Irish voters rejected the Lisbon Treaty in June 2008. A new referendum to be held later this year will likely decide the Treaty's fate, although a few other Member States must still complete their ratification procedures (Reftel). The Treaty would retain many institutional and decision-making changes that the Constitutional Treaty for

the EU -- defeated by referendum in France and Holland in 2005 -- provided on justice and police cooperation in criminal matters. These provisions on Justice, Freedom, and Security (JLS) arguably represent the most important procedural and substantive changes of any area under the Treaty and merit close attention for their impact on transatlantic cooperation on criminal matters.

MERGING OF THE FIRST AND SECOND PILLARS

¶4. (U) Currently, the legal framework established by the 1997 Treaty of Amsterdam separates issues in the Justice, Freedom, and Security (JLS) area (also known as Justice and Home Affairs -- JHA), among two different institutional and procedural "pillars." Immigration, asylum, visa, and civil justice issues fall under the first pillar as do other community-wide issues, including trade and commerce, while justice and police cooperation on criminal matters falls under the third pillar. The second pillar, encompassing Common Foreign and Security Policy issues, will retain unique decision-making procedures. Under the current system, adoption of community-wide decisions affecting the third pillar requires inter-governmental consensus, or unanimity, among all 27 Member States within the Council of Ministers -- a threshold often difficult to achieve. Originally, the requirement for unanimity preserved individual Member State prerogatives in areas considered matters of national sovereignty, particularly enforcement of criminal laws. Member States gradually ceded aspects of their sovereignty to the EU by adopting common policies, procedures, and beneficial practices related to mutual recognition of court decisions (i.e., introduction of the European Arrest Warrant in place of extradition) and sharing of law enforcement information.

¶5. (U) With some exceptions, the Lisbon Treaty merges the existing first and third pillars by adopting qualified majority voting (QMV) as the "ordinary procedure" or norm for making decisions in the Council of Ministers. Thus, the Council of Ministers, meeting in one of its nine configurations of Cabinet Ministers from specific sectors -- in this case, Interior and Justice Ministers -- will decide on police and criminal justice cooperation by QMV in place of unanimity. QMV, also known as "double majority voting," will ultimately require approval by 55-percent of the Member States (i.e., 15 of 27 the current Member States) representing at least 65-percent of the EU's population. To ensure that the most populous Member States acting alone cannot block proposals, at least four Member States must vote against a measure for it to be defeated.

QUALIFIED MAJORITY VOTING

¶6. (C/NF) Treaty supporters predict that use of QMV will produce higher quality legislation. Supporters of legislative proposals will be able to prepare such legislation without having to water down the proposals to gain the support of individual Member States threatening to veto such proposals. In theory, proposals will not suffer from the least-common-denominator approach that often now results from decision-making on JLS issues. Moreover, the merging of the two pillars could reduce some artificial distinctions currently erected by Member States among border protection, asylum, migration, counter-terrorism, and transnational crime issues. This process of reducing cross-jurisdictional barriers will take some time, as existing distinctions codified in community law will remain until modified.

¶7. (U) Complicating even further the decision-making process, the Treaty contains a transitional provision for QMV as a concession to Poland for its assent to the draft Treaty. The transitional provision preserves current QMV requirements for most community-wide issues from the 2001 Nice Treaty, which

requires approval beyond a simple majority (i.e., 50 percent of the votes plus one) -- taking into account demographic weights assigned to Member States. Such weights range from a maximum of 29 votes for the largest Member States to a minimum of three votes for the smallest ones.. This transitional provision will remain in force until at least 2014 and possibly as late as 2017. Under it, the Council must re-examine legislative proposals to try to overcome minority objections, if either one-third of the Member States, or Member States representing 25 percent of the EU population, oppose them. During this transition, Member States will not be able to make rapid, dramatic changes in EU legislation on police and judicial cooperation, thereby allowing for gradual adjustment by Member States to the new distribution of powers within the EU and its institutions.

ENHANCED COOPERATION

¶8. (C/NF) The Lisbon Treaty also provides for possible "enhanced cooperation" among Member States for implementation of measures on specific types of police cooperation, including operational cooperation among law enforcement entities, and establishment of a European Public Prosecutor (EPP). To date, Member States demonstrated considerable reluctance to use this procedure under the current legal framework and occasionally worked outside EU institutions to achieve desired results. Initial establishment of the Schengen System and negotiation of the Pruem Treaty constitute prime examples of such maneuvers. In the case of Pruem, Germany and several Member States agreed to share DNA, fingerprints, and vehicle registration data from their national databases on a "hit / no hit" basis, as well as underlying information from such matches via later mutual legal assistance requests. Under the German Presidency in 2007, the Council agreed in principle to incorporate Pruem Treaty provisions within the EU legal framework, except for more controversial, forward-leaning provisions on cross-border responses by police forces in emergencies and use of air marshals.

¶9. (U) Lisbon Treaty drafters revised provisions on enhanced cooperation to encourage use of such decision-making measures in place of going outside the EU's institutional and legal framework. While the Treaty will continue to emphasize inter-governmental consensus (unanimity) as the desired basis for making decisions, it will allow for use of enhanced cooperation on certain JLS initiatives as a decision-making procedure of last resort. Under the new Treaty, if unanimity does not exist on proposals for establishing an EPP or on certain types of police cooperation, including operational cooperation among law enforcement entities, the Council of Ministers may refer the measure to the Council of the European Union (composed of heads of state from all 27 Member States) to try to reach consensus within four months. If consensus results, the heads of state will refer the proposal back to the Council of Ministers for adoption via the ordinary legislative process (i.e., QMV and co-decision with the EP.) If no consensus emerges among heads of state, and if at least one-third of the Member States (i.e., nine or more of the current 27) supports the proposal, they may obtain authorization from the Council of Ministers via QMV to adopt and implement such legislation among themselves.

¶10. (C/NF) Treaty supporters argue that such provisions on enhanced cooperation will make it more likely that Member States will resort to such cooperation rather than going outside the Treaty's institutional framework. Nonetheless, such provisions retain much of their earlier complexity, which may make Member States reluctant to use them. In any case, use of enhanced cooperation carries the risk of producing an even greater patchwork than currently exists of differing legal measures on justice and police cooperation on criminal matters. Development of more complicated and uneven legal systems would require Member States and non-EU states alike to make even greater efforts to track differences among

legal frameworks applicable to different Member States. This development would also exacerbate U.S. preference to deal bilaterally with individual Member States on certain types of police and judicial cooperation and further undermine ability of fledgling EU institutions, such as the European Judicial Coordination Unit (EUROJUST) and European Police Office (EUROPOL), to generate and sustain cross-border cooperation.

OPT-IN PROVISIONS

¶11. (C/NF) The current legal framework has permitted a few Member States, specifically the UK, Ireland, and Denmark, to "opt out" of individual provisions involving police and judicial cooperation. Under the Lisbon Treaty, as a trade-off for agreeing to provisions permitting QMV and co-decision with the EP, the UK and Ireland may choose to "opt-in" selectively to provisions they favor. This concession, in part, reflects the differing legal systems and traditions of these two Member States, with common law legal systems in contrast to the civil law legal systems of much of continental Europe. The UK and Ireland may decide that they do not wish to participate in particular measures proposed for adoption via enhanced cooperation. Later, if they deem the final result unobjectionable, they may decide to opt in. By that point, however, they may have lost their ability to influence the content of such measures. In any case, under the new Treaty, JLS measures will not automatically apply to all Member States.

¶12. (C/NF) The new Treaty requires that all Member States abide by measures to which they had agreed before the Treaty's entering into force. However, amending existing legislation could produce interesting scenarios. For example, the UK or Ireland may decide to opt out of such amendments, even though they had previously adopted the measures under revision. Nevertheless, in such instances, if other Member States decide by QMV that their withdrawal would "affect the effectiveness of the measure and make it inoperable," they could force the UK or Ireland to withdraw from the entire measure and not just the amended portion. Again, provisions for opting in or opting out of individual measures or withdrawing from amendments to existing legislation have the potential to exacerbate the already uneven patchwork of differing legal frameworks within the EU. Again, such actions could complicate not only internal EU law enforcement relationships but also dealings with third countries.

PULLING THE EMERGENCY BRAKE

¶13. (C/NF) Under the new Treaty, a Member State may object to a specific JLS measure, if it deems such a measure would affect fundamental aspects of its criminal justice system. Such objections would occur through a process that complements the enhanced cooperation procedure. In case of objection, the Member State may refer the matter to the heads of state within the Council of the EU, suspending the measure's consideration for four months. If the heads of state reach consensus within four months, they may refer the measure back to the Council of Ministers for resumption of the ordinary approval process (i.e. approval by QMV and co-decision with the EP). If, on the other hand, heads of state fail to reach consensus within this period, then the proposal fails to win approval via the ordinary decision-making process. Nevertheless, in such a case, if at least one-third of the Member States still favors the proposal, then this group of nine or more may adopt the measure under enhanced cooperation. Proponents of the "emergency brake" provision predict Member States will use this measure judiciously and only as a last resort, because of the political capital they would expend in employing it. In most cases, the threat of using this emergency brake would likely allow Member States to gain concessions regarding their concerns. Views differ on whether the UK and Ireland

would choose to pull this emergency brake, as they already have the right to opt in to legislation they favor. Indeed, pulling the emergency break after their employing this opt in procedure would occur in only rare cases, if at all.

INCREASED POWERS FOR MEMBERS OF THE EUROPEAN PARLIAMENT

¶14. (C/NF) Under the current treaty framework, the European Commission and individual Member States have the power to initiate legislation, and the Council need only consult with the EP regarding such proposals. Currently, the EP provides non-binding observations on legislation to the Commission as part of such consultations. While Commission officials sometimes modified proposed legislation to address EP concerns, for years they more often ignored or paid lip service to these concerns when amending and approving draft Framework Decisions.

¶15. (C/NF) Accordingly, the EP co-decision authority on JLS legislation constitutes one of the Lisbon Treaty's most significant provisions. A UK expert at a think-tank event in Brussels described this change as creating essentially a bicameral legislature involving both the Council and the EP, with both bodies deciding on JLS legislation. As a result, the EP will experience an overall increase in power, with EP Members (MEPs) having the ability to offer amendments to proposed JLS legislation, rather than serving merely as a consultative or advisory body. Proponents of EP co-decision authority claim this change will increase transparency and accountability for legislation affecting judicial and police cooperation in criminal matters. As MEPs often assert, their institution is the only EU body whose members are directly elected by EU citizens.

¶16. (C/NF) Some critics worry that MEPs will place too much emphasis on protection of civil liberties and privacy rights of individuals at the expense of promoting law enforcement cooperation to enhance common security. Several high-profile MEPs, particularly those from the influential Human Rights, Justice, and Home Affairs (LIBE) Committee, have strongly criticized measures to promote transatlantic sharing of law enforcement information as violating individual privacy rights and civil liberties. A close Council Secretariat contact has assured us repeatedly that MEPs will express more balanced positions after they obtain genuine powers over JLS legislation. He said moderate views of the larger political groupings and parties will prevail in votes on JLS legislation and generally mirror those of Member State governments. Nonetheless, given extreme positions sometimes expressed publicly by current MEPs, such predictions may stem more from wishful thinking than objective analysis.

¶17. (C/NF) In recent months, in anticipation of Lisbon Treaty ratification, Commission officials have consulted more closely with MEPs, particularly on sensitive measures involving data privacy and sharing of law enforcement information. Indeed, Commission counterparts have argued repeatedly that, because of the anticipated greater EP role, they must wait for Treaty entry into force before setting a formal mandate for negotiating a binding international agreement with the U.S. on data privacy. With or without Lisbon, we do not see EU officials back-tracking on closer consultations, amounting to de facto co-decision with the EP.

GREATER POWERS FOR NATIONAL PARLIAMENTS AS WELL

¶18. (C/NF) The Treaty also provides for systematic consultations with national parliaments of Member States on adhering to the "subsidiarity" principle, which provides that the EU may only legislate where such action can be done better at the community level than at national or local levels. National parliaments may voice objections to proposed legislation, if they view such measures as violating

this principle. If at least one-third of national legislatures (i.e., nine or more of the national legislatures in the 27 Member States) object, then the proposal must go back to the Commission for additional review to try to address objections. If a majority of the legislatures object, then the Commission must consult with Member States and the EP for their views on the subsidiarity principle. Although not exercising a formal veto, national parliaments will have the power to seek additional review or slow down approval of proposed legislation. Reviews could occur within the inter-parliamentary body (known as COSAC) that currently meets twice yearly, but would probably have to meet more frequently under the Treaty. An EP professional staff member opined at a think-tank event that such consultations will enhance transparency and democratic legitimacy for JLS legislation. She compared such safeguards to use of yellow and red cards in professional soccer matches, which referees use to indicate less or more serious rule infractions. Under this system of parliamentary scrutiny, elected representatives at the national level can influence the content of proposed legislation. Additionally, each house of each national parliament may refer a measure to the European Court of Justice (ECJ) for any perceived violations of the subsidiarity principle, thereby providing additional safeguards.

INITIATORS OF LEGISLATIVE PROPOSALS

¶19. (C/NF) Under current rules, either the European Commission or individual Member States may initiate JLS legislative proposals. In practice, the Commission produces most proposals, known as Framework Decisions, often at the Council's direction, but some Member States also initiate proposals. The new Treaty will change these rules slightly by allowing either the Commission or one-quarter of the Member States (i.e., seven or more of the current 27) to propose legislation. This change will encourage Member States wishing to table proposals to seek support of like-minded states before presenting it to the Council. Nonetheless, this situation will not be much different from the current one, which already places a high premium on consensus-building.

LAWS WITH DIRECT LEGAL EFFECT

¶20. (C/NF) Under the existing legal framework, legislation on criminal police and justice cooperation does not have direct legal effect. Instead, Member States must enact national legislation to implement the provisions of a Framework Decision either after Council approval or, in some cases, beforehand. Moreover, Commission officials cannot initiate infringement proceedings against Member States that fail to implement approved Framework Decisions, although they can undertake evaluations of Member State performance. Critics insist such limitations have hindered effective implementation of JLS legislation. Currently, implementation is uneven at best among Member States, with wide variations in the quality of enforcement. In some instances, enforcement of laws against corruption and violations of data privacy leave much to be desired. Moreover, the ECJ now has limited jurisdiction over third pillar issues, and individuals generally do not have legal standing to enforce their rights in this area.

¶21. (U) The Lisbon Treaty stipulates that JLS legislation will have direct legal effect and that the Commission will have the power to enforce implementation of JLS laws through infringement proceedings against individual Member States. Such infringement proceedings could result in assessment of substantial fines, as has occurred within the private sector under enforcement of Community-wide provisions on competition and trade. Treaty supporters insist this power will substantially strengthen the Commission's ability to promote efficient enactment of JLS provisions. Even terminology for

legal instruments will change, as Decisions become Regulations and Framework Decisions become Directives. Designations of already adopted instruments, however, will remain the same, unless such instruments undergo amendment or repeal.

EXPANDED ECJ JURISDICTION

¶22. (C/NF) Under the Treaty, the ECJ will enjoy greater jurisdiction over JLS legislation. EU citizens will have the right to appeal administrative and judicial decisions in JLS matters before the courts. Preliminary references will be available from any national tribunal or court, except that the ECJ will not have jurisdiction over operations conducted by police and law enforcement services or the exercise of Member State responsibilities for maintaining law and order and safeguarding internal security. We anticipate that expanded ECJ authority will have a major impact on U.S.-EU law enforcement cooperation, especially on implementation of procedures and safeguards.

LEGAL PERSONALITY FOR THE EU

¶23. (C/NF) The EU will also confirm and assert its legal personality under the new Treaty, as the EU will formally be able to enter directly into agreements with third nations in areas under its competence, as the EU has already done with the U.S. on matters such as mutual legal assistance and extradition. In some cases, the EU will have exclusive competence, while, in other areas, the Member States will continue to wield exclusive jurisdiction. In other cases, mixed competence will result. Interestingly, the EU may decide under the Treaty of Lisbon to negotiate certain agreements with non-EU countries under Common Foreign and Security Policy (CFSP), which involves a separate set of decision-making rules. The EU recently negotiated a Passenger Name Record (PNR) Agreement with Australia under the second pillar, rather than under the first or third pillars as with earlier agreements of this type. The EP will not enjoy co-decision powers under CFSP.

WHAT ABOUT PLAN C?

¶24. (C/NF) The Lisbon Treaty already represents the fall-back, or Plan B, to the failed Constitutional Treaty of 2005. Should ratification fail, EU counterparts will enter into another period of reflection likely to last years, given that EU officials have no real Plan C. Should this happen, then EU officials may find themselves packaging certain JLS provisions from the Treaty into smaller, more acceptable parts that promote piecemeal, de-facto implementation over time. With or without Lisbon, we will need to confront the impact of its provisions, particularly on QMV and co-decision for the EP.

RECOMMENDATIONS FOR U.S. POLICY MAKERS

¶25. (C/NF) If ratified, and before the Lisbon Treaty enters into force, U.S. policy makers should continue pressing for final ratification -- by Belgium and Greece -- of the U.S.-EU mutual legal assistance and extradition agreements as well as establishment by the EU of a negotiating mandate for a binding international agreement on data protection principles identified and defined by the U.S.-EU High Level Contact Group. After entry into force, approval of agreements may become more problematic because of the EP co-decision role. U.S. officials may wish to explore flexibility that may exist for negotiating agreements under the CFSP process, instead of under the Treaty's ordinary procedure for JLS issues. Finally, the Mission and U.S. Embassies in Member States will

also want to chart strategies for expanded outreach with moderate political groupings and parties of the new EP (to be elected in June) and national parliaments to exchange views on issues, policies, and proposed legislation on police and judicial cooperation in criminal matters.

MURRAY